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**CAN THE EU DELIVER THE AREA  
OF FREEDOM, SECURITY AND JUSTICE?**

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# **CAN THE EU DELIVER THE AREA OF FREEDOM, SECURITY AND JUSTICE?**

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In 1997, the European Union set out the broad aims of its next big project: the construction of an 'area of freedom, security and justice'. The EU has set itself a task at least as ambitious as the single market project. To guarantee freedom and justice, while enhancing security, the EU will have to do the following: make national criminal laws more similar; make national police forces and prosecutors work together more effectively; build a common border guard; develop common asylum and visa policies; make the EU courts more efficient; guarantee the rights of individuals and ensure that EU agencies are accountable for their actions. In order for the EU to be able to make these politically sensitive and far-reaching reforms, the member states must give the European Union more power to make and enforce laws in these areas.

The measures the EU is taking to build the area of freedom, security and justice fall into a policy area known as justice and home affairs (JHA). But a number of factors make it difficult for the Union to make effective justice and home affairs policies. For example, member states must agree unanimously in order to make most decisions, which makes policy-making tortuously long. Moreover, the EU treaties' confusing legal structure spreads JHA policies across all three of the Union's 'pillars' and applies different procedures to policy-making in each pillar.

In 2001, European heads of government decided to establish 'The Convention on the Future of Europe' to prepare a single draft Constitutional Treaty to replace the patchwork of treaties that currently set out the way in which the EU is run. The Convention was a prime opportunity for the member states to empower the EU to build the promised area of freedom, security and justice. Many commentators considered the justice and home affairs machinery especially ripe for reform.

The Convention completed a draft of the Constitutional Treaty in July of this year. At the next stage, an intergovernmental conference (IGC) will debate the treaty and present a final version to heads of state and government for signature in 2004. There is a risk that national governments will try to make large-scale changes to the draft treaty at the IGC. Whether they do or not, the new Constitutional Treaty, if successfully ratified, would become the most important EU document, codifying what the Union can and cannot do, and how it should do it.

The new draft Constitutional Treaty lays a stronger foundation for the area of freedom, security and justice, but it does not make the step change that many think necessary. On the positive side, the draft treaty would:

- allow the Union to apply only one procedure when it makes JHA laws and policies – which should make policy-making faster and more coherent;
- require the Council, which brings together national ministers to approve EU decisions, to use qualified majority voting rather than unanimity when voting on most JHA legislation – which should speed up decision-making;

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- expand the role of the European Parliament in JHA law-making, which will enhance democratic scrutiny of JHA decisions;
- strengthen the legal impact of Union legislation in member states by giving laws more direct effect;
- extend the jurisdiction of the European Court of Justice (ECJ) to cover JHA, which would strengthen the rule of law at the EU level;
- incorporate the Charter of Fundamental Rights and codify other rights and principles of Union law, which would strengthen the formal protection of citizens' rights; and
- bring the emerging European police office Europol within the EU's treaty framework, which means the Union could monitor and reform it more easily.

In its current form, however, the treaty would not give the EU enough power to deliver the area of freedom, security and justice. Europe needs to do much more to address major cross-border issues such as crime and international terrorism. The EU needs to regulate migration and reform its judiciaries to cope with the creation of the area of free movement and the resulting increase in cases with cross-border elements. These issues are beyond the ability of any individual member state to control. EU leaders readily admit this, but many national governments are unwilling to accept that addressing this situation will mean pooling more sovereignty at the EU level.

Politicians throughout Europe continually bemoan the Union's ineffectiveness and its inability to deliver. But in the case of the draft Constitutional Treaty, it is the member states that have failed to deliver a more effective Union. This is surprising and regrettable. This paper looks superficially at the extent to which the draft Constitutional Treaty would improve the EU's ability to build the area of freedom, security and justice. It considers the impact of the incorporation of the Charter of Fundamental Rights, the proposed reforms to the EU courts, the changes to the internal security powers of the EU and proposals for the harmonisation of national criminal laws.

### **Progress so far**

The Union has made only slow progress in constructing the 'area of freedom, security and justice' promised in 1997. At Tampere in 1999, heads of government fleshed out what building the area would entail. The Tampere agenda, as it came to be known, contained a number of targets and deadlines. Nevertheless, four years on, the Union has not delivered on the agenda, and the elements it has delivered are mostly incomplete or unsatisfactory.

The EU has developed only the vaguest outline of an immigration policy, while making slightly more progress on building a European asylum system. Although it is 18 years since the founding members of the Schengen area signed the original agreement to remove border controls, Schengen still lacks an effective policing system. While Tampere remains undelivered, the challenges are not diminishing. It has become very clear that migration is going to reshape societies in the 21<sup>st</sup> century as much as it has in past centuries. And transnational 'soft security' threats like organised crime and international terrorism are not subsiding.

With the creation of the Schengen zone, organised crime gangs and terrorists can now operate across the Union in the same way that they can operate across the United States. Western intelligence agencies confirm that Abu Dahdah, the al-Qaeda operative who supported some of the 11 September hijackers while they resided in Hamburg, travelled widely throughout Europe during period leading up to the attacks. Al-Qaeda members met several times in Spain during the planning of the attacks. And after the attacks, police rolled up al-Qaeda related

cells in Italy, Belgium, Spain, Britain and France. This suggests that al-Qaeda had already adjusted itself to take advantage of the lack of border controls within the Schengen area. But member states have not done the same. They still organise their police forces, prosecution services and judiciaries at the national level.

As a result, police forces cannot cross borders as easily as the criminals and terrorists they pursue. And once police forces do arrest suspects involved in cross-border crime, prosecutors find it hard to convict them, because identifying and collecting evidence and witnesses from different member states is legally complicated, time-consuming and expensive. The German prosecutors of four terrorists who had planned to bomb the Christmas market in Strasbourg in 2000 had to drop some criminal charges – including those of belonging to a terrorist organisation – partly because they could not easily bring evidence and witnesses from France.

Moreover, member states define and punish the same crime in different ways. So individuals who belong to the same criminal organisation, but who are arrested in different member states will be prosecuted by different authorities in separate cases and may receive different punishments for the same crimes. One Italian prosecutor described this as “jurisdiction fall[ing] behind criminality”. This can undermine the public’s confidence in the judicial system. A single area of justice would imply, as a minimum, more or less the same outcome for the same act throughout the area of freedom, security and justice.

The removal of internal border controls also means that together, the 15 Schengen states rely upon the remaining external border controls to keep out the people and goods they do not want. If Schengen members share the same external border, then they should also pool their border control efforts. At present, each member state takes responsibility for controlling their section of Schengen’s external border. More significantly, they do so using different methods, different equipment and with varying standards.

So why, if there is such a pressing need, has the Union failed to deliver? The answer lies in a tangle of political, institutional and practical reasons. First, police, criminal law, human rights and the administration of justice are politically very sensitive issues that national politicians are reluctant to relinquish any control over. Second, the national institutions and lobby groups involved are powerful and not natural Europhiles. Ministries of the interior and justice, for example, are influential and inward-looking institutions, while lawyers and judges are often amongst the most conservative members of society. Third, the member states practice law enforcement in very different ways and have very different criminal laws and procedures. This makes it difficult in practical terms for police officers and prosecutors in different states to exchange information and do joint investigations and prosecutions easily. And because there is such variety in national legal systems, it is difficult for the EU to convince courts not to question the decisions of courts in other member states. Finally, as mentioned above, the EU does not have the power to make effective laws rapidly, or the institutions to implement and enforce them.

Some commentators predicted that the events of 11 September 2001 would dissolve nationalist instincts in Europe and push the member states to radically reform the way the European Union makes and implements justice and home affairs policies. The Convention began its work at a time when member states were regularly uncovering suspected terrorist cells. Hence, it was no surprise that in December 2002 the Convention’s justice and home affairs working group handed an ambitious final report to the praesidium. The Convention’s first draft of the JHA articles closely followed the working group’s recommendations. For a time, it looked as though the member states had successfully used the political momentum

generated by 11 September and the opportunity provided by the Convention to give the EU the powers to develop the promised ‘area of freedom, security and justice’.

But national governments have been growing progressively uneasy about proposed increases in EU powers in the JHA field. The draft Constitutional Treaty that the Convention completed in July 2003 reduced the EU’s powers from the high-water mark set by the praesidium’s earlier draft. In the time between the two drafts, the more cautious member states won many concessions.

The latest draft maintains the key positive reforms – abolishing the separate pillars, incorporating the Charter of Fundamental Rights, increasing the involvement of the European Parliament and the use of qualified majority voting on justice and home affairs issues. But it also gives the member states room to block, avoid or water down future Union proposals.

As a result, the Union would have a better foundation for the area of freedom, security and justice, but would still lack the power to drive through a Tampere II. After enlargement, pressure will build quickly on member states to return to the treaty and strengthen the EU’s powers to address the added challenges a bigger, more complicated Union will face.

### **The draft Constitutional Treaty would strengthen freedom – and increase uncertainty**

The drafters of the Constitutional Treaty should be proud; the draft treaty proposes reforms that would increase the emphasis on rights and increase oversight of the EU institutions and agencies. Unfortunately, some member states insisted on amendments that have made the impact of the treaty unclear. This could increase litigation and reduce the popularity of the treaty, as citizens are not going to try to read complicated legal explanations about how to interpret the treaty. The uncertainty also makes it difficult to judge the extent to which the Union’s draft Constitution would actually protect rights. Much will depend on how the European Court of Justice interprets the rights provisions in the treaty.

The European Union’s draft treaty is full of provisions giving formal protection to human rights – it even repeats some rights twice. Article 2 of the draft confirms that one of the Union’s core values is respect for human rights and draft Article 7 of Part I lays down the three main planks of the EU’s commitment to fundamental rights:

- The draft treaty incorporates the Charter of Fundamental Rights in full as Part II of the treaty.
- Draft Article 7 empowers the Union to seek to accede to the European Convention on human rights.
- Paragraph 3 of draft Article 7 would make fundamental rights “general principles of the Union’s law”.

The draft also repeats the special rights that EU citizens receive from the Union and the prohibition against discrimination. These include the rights of citizens to move and reside freely throughout the Union and to vote and stand in elections for the European Parliament in the member state in which they reside.

The draft treaty would also strengthen **oversight of the Union’s institutions and agencies**. The treaty would give national parliaments a role in scrutinising Europol and Eurojust, the EU’s fledgling police and prosecutor’s offices respectively. The European ombudsman would have an explicit remit to follow up on complaints about EU institutions, bodies and agencies. This would enshrine the current practice. The alternative wording – “EU institutions” – is narrower, and could exclude some EU agencies and bodies, whose activities impact heavily

on human rights, like Europol and Eurojust. The jurisdiction of the ECJ would also be extended to allow it to hear cases concerning laws made on justice and home affairs.

National governments have debated for some time whether they should make the **Charter of Fundamental Rights** legally binding. Despite serious reservations from the UK government, whose former Minister for Europe Keith Vaz famously said that the Charter would be ‘as binding as Beano’, the draft Constitutional Treaty would make the Charter legally binding. Nevertheless, the Convention had to agree on a number of compromises to the text that make it very difficult to gauge what influence the Charter would actually have over the lives of the citizens and residents of the EU.

Some governments, such as the UK, Denmark and Ireland, are worried about attacks by critics at home, who say the Charter is an underhanded way of passing sovereignty to Brussels. The UK government is running contradictory domestic and European policies on the Charter, which is having damaging results in both arenas. To its European partners, the UK government has indicated it intends to continue to fight to restrict the influence of the Charter all the way to the end of the intergovernmental conference. This annoys other governments that consider the incorporation of the Charter to be a ‘done deal’ – as well as something that could be popular with EU citizens. On the home front, the UK government is attempting to maintain the fiction that incorporating the Charter would change nothing. We can expect government representatives to make more ‘Beano’ comments, ‘business as usual’ claims and ‘tidying up exercise’ statements, which, when ridiculed by the media, help to increase public scepticism about the whole draft treaty.

The UK government is right to be worried about the lack of public support for the Charter. Much of the British public thinks the Charter could be an EU ‘Trojan horse’. One headline in Britain’s *Sun* newspaper of 27 May claimed that incorporating the Charter would cost Britain 2 million jobs. British suspicions about the Charter are based on more than irresponsible media reports. They also reflect the fact that the UK does not have a modern bill of rights – or even a written constitution. Moreover, explicit written limitations on the power of government sit uneasily with the UK doctrine of parliamentary sovereignty. Ultimately, if the British public do not want to accept the principles and values contained in the Charter, their government should not force them to do so.

The consensus in the Convention for making the Charter legally binding was very broad. So the members that were opposed switched tactics and attempted to ‘ring-fence’ the operation of the Charter as far as possible. The most potent amendment is a draft article which establishes a distinction between rights and principles. Principles, the draft article asserts, “*may be implemented by legislative acts*”, which suggests they are optional. Crucially, the Charter does not say which articles are principles and which ones are rights. The IGC should clarify the distinction between rights and principles, and spell out which articles are principles and which are rights.

Other amendments would have little practical effect and were inserted mostly for political reasons. These include a draft article assuring that the Charter would only apply to EU legislation and not to purely national laws, and a provision stating that the Charter should not become a back-door method of giving the EU new powers over member states. In addition, phrases in the Charter like “in accordance with Union law and national laws and practices” are intended to prevent contentious articles from altering national law. The phrase appears in articles enshrining the right to conclude collective wage agreements, the right to strike and the right to receive social security benefits. Yet the Charter would only apply to EU law, and the EU cannot make laws about issues such as when national workers can and cannot strike.

Some of the Charter's detractors base their arguments on a misreading of the document and/or a lack of understanding of how national and EU courts are likely to apply the rights in practice. Few rights are absolute: most are restricted by other considerations that can form specific or general exceptions to their operation. For example, libel laws restrict the right to free speech in most democracies, and firemen in Germany do not have the right to strike because of the danger to public safety. The US and UK courts – and the European Court of Human Rights – have even, in the context of fighting terrorism, allowed their governments to breach the prohibition on detention without trial. So commentators should not read the Charter in the abstract. To interpret the Charter, readers should consider not only the limitations other parts of the draft treaty impose upon it, but also the restrictions and exceptions the courts are likely to apply in interpreting it.

It is bewildering that some national governments are so opposed to embedding human rights and freedoms in the fabric of the European Union. All European national governments now proclaim themselves to be the protectors of freedom and justice. So why oppose strengthening the protection of rights within the EU? Apart from the legal and political importance of incorporating the Charter, a single list of rights would also make the Union more understandable and popular with its citizens. The US Bill of Rights makes US citizens aware and proud of their rights, and every French schoolchild learns about the 1789 Declaration of the Rights of Man.

The uncertainty surrounding the Charter and other rights provisions in the draft treaty is bad for citizens and for the popularity of the Union, but it also makes the legal impact of the Charter uncertain. A strong legal foundation for human rights would make it easier for courts throughout Europe to build a single framework of human rights law as part of EU and national law, with fewer contradictions and clearer principles than the variety of sources that exist now. Moreover, member states, by injecting lots of uncertainty into the operation of the Charter, have hurt their own cause. They have handed some of the initiative for defining the balance of power between member states and the EU institutions over to the vagaries of litigation in the European Court of Justice.

It is unclear whether the ECJ will interpret the Charter in such a way as to indirectly increase the powers of the EU institutions at the expense of national governments. The ECJ has traditionally been a force for integration in the EU. But although the rights in the EU treaties have guided the Court's decisions throughout its history, the ECJ has been far less of an activist than the US Supreme Court and has rarely struck down legislation on the grounds that it breaches rights.

Balanced against this is the constitutional history of federal states like Germany, the US and Australia. The experience in those countries suggests that when federal courts interpret rights granted by a federal constitution, over time, it tends to result in a transfer of power upwards. If this proves true for the European Court of Justice, the Charter of Fundamental Rights could become one of the defining elements of the European Union. Regardless of whether the ECJ maintains the current balance of power between the Union and its member states or not, the Charter should exert a steady, positive influence over the legislation and behaviour of the European Union, its institutions and agencies.

### **‘Justice delayed is justice denied’**

The Convention's draft Constitutional Treaty continues the cautious reforms member states made to the European Court of Justice at Nice in 2000 – and would make the EU slightly more just. The draft treaty would reinforce the rights of persons who are on trial; increase the jurisdiction of the ECJ to cover most of JHA and slightly improve the ability of the EU to

align national criminal law systems to make member states treat the same crime in more or less the same way. The draft would, however, greatly increase the caseload of the already overburdened EU courts without reforming the court system to cope. If the courts cannot administer the law effectively and efficiently in practice, then it does not matter how just and noble the draft Constitutional Treaty is.

In many ways, the **European Court of Justice** has been the most successful and the most federal of the EU's institutions. These two attributes are linked, because the court has a clear and independent mandate compared with the International Court of Justice, which settles disputes between states but issues only advisory decisions and is widely considered by international lawyers to be ineffectual. The few citizens who know the European Court of Justice exists tend to respect it. The ECJ's biggest problem is its slowness: it can take two years for it to make a preliminary ruling on a question referred by a national court. There are four additional factors that will increase the Court's caseload over the next decade and suggest that national governments should make the court more efficient now.

First, the Charter of Fundamental Rights could generate a lot of litigation as plaintiffs test out its limits and meaning. The member states have made litigation more likely by making the operation and interpretation of the Charter unclear.

Second, enlargement will expand the regular caseload of the EU courts simply because there will be a third more countries doing battle in the EU court system. The Commission may also need to bring cases against new member states to force them to iron out some of the remaining wrinkles in their compliance with the *acquis* – especially on state aid and the protection of some industries. If enlargement drives another round of consolidation in industry, then this could lead to more disputes about the Commission's competition rulings. The courts of the new members are also less experienced with EU law and may request more preliminary rulings from the EU courts.

Third, the adoption of the new Constitutional Treaty could make the overall Union legal framework more uncertain for a time, which could lead to an increase in disputes. A measure of uncertainty and settling-in would be expected with constitutional engineering on this scale, but the member states could have helped by doing a better job of making the draft treaty clearer. The subsidiarity principle and the provisions on competences (what the EU can do, what member states can do and what is shared), for example, are likely to generate a lot of litigation.

Fourth the draft Constitutional Treaty expands the court's jurisdiction to cover almost all of justice and home affairs, which is a very contentious and sensitive area, and one in which the EU is expected to generate lots of new laws and possibly institutions over the coming years, such as border guard and cybercrime agencies.

In line with the Nice Treaty, the draft Constitution sets out three levels of federal courts. The European Court of Justice remains the supreme court of the Union, and its function is largely unchanged – to interpret the treaties and provide rulings on important questions of EU law. The draft treaty would rename the Court of First Instance the 'High Court'. The draft treaty would allow the Union to establish 'specialised courts' below the High Court to hear cases in certain specific areas of law – intellectual property for example. The Union should establish these specialised courts immediately (the Nice Treaty of 2000 already permits this) to test whether they would improve the administration of justice or not.

The draft treaty would also restrict the ability of persons to appeal from the High Court to the ECJ, which should help reduce the ECJ's caseload. These changes add up to a half-hearted attempt to reduce the overload, but do not go far enough. Citizens must ultimately go to the



courts to enforce their rights. If they cannot get timely justice from the court system because it is overloaded, then fancy constitutional provisions protecting human rights are pointless.

Currently, it is very difficult for **individuals to challenge EU legislation** in front of the ECJ. The rule for 'standing' – the legal term for the right to bring a case in front of a court – is that the person must have both a 'direct and individual concern'. The courts have interpreted the rule very narrowly. The draft treaty would maintain the current 'direct and individual concern' test for standard legislation, but would make it easier for individuals to challenge so-called 'delegated acts'. The Commission would make delegated acts under an authority granted by a regular EU law. The rationale for making it easier for individuals to challenge delegated acts for breaches of the Constitutional Treaty is that they are implemented without going through the full democratic review process. So they should be subject to enhanced judicial review. Citizens affected by Union legislation would thus find it easier to seek justice.

The draft treaty confirms the **supremacy of EU law** over national law. Some national politicians were up in arms when this draft clause emerged, announcing that it represented the final takeover of the nation-state by Brussels. Nevertheless, and apparently to the surprise of national politicians across Europe, this draft article correctly reflects the situation as it has been at least since 1964. (In one Convention meeting, a representative from one national government asked that, although all present were aware the draft clause accurately reflected reality, to avoid alarming the public, could the Convention please avoid spelling this out so clearly?)

As the single market deepens and people move freely across borders, the volume of court cases with a cross-border element is increasing. To deal with such cases, the European Union needs to knit the national **civil law** systems together more closely. The Union's ultimate aim is to ensure that courts throughout Europe efficiently enforce laws that concern cross-border issues according to common procedures. This is one part of the 'area of justice' and implies far-reaching reforms.

The Union has to make the decisions of judicial authorities in one member state valid and binding throughout the Union. For example, if a court in Spain decides a child should live with its mother in a custody case, courts in other countries should not be able to come to different conclusions. This should apply not only to final judgements, but also to the procedural decisions that courts make along the way to reaching a final decision. For example, if, during a dispute about an alleged non-payment, a German court orders the freezing of a defendant's assets contained in a bank account in Portugal, then the Portuguese authorities should do so immediately, rather than allowing the defendant to appeal to a Portuguese court. The owner of the bank account can of course still dispute the decision in the usual way in Germany.

The EU also needs to reform **criminal law** to deal with cross-border crime, especially now that there are no border controls between Schengen members. The draft treaty provides a definitive list of such crimes – which include money-laundering, terrorism, drug and arms trafficking, corruption and computer crime. This is one area where member states seem to have their heads in the sand. The challenge of making criminal law work in an area of free movement with 17 different national systems is massive, and the draft treaty would not give the EU the powers to make effective reforms.

The draft treaty would extend qualified majority voting into some aspects of policy-making in the field of criminal law – which should speed up law-making there. But, the draft treaty requires unanimity in several areas that could slow down the Union's ability to respond to

changes in criminal behaviour. For example, the Council must agree unanimously to extend the list of cross-border crimes that the EU may define.

Crucially, the draft treaty would restrict the Union to using laws that leave member states with lots of room to water down their intended effect or would not align member states' practices enough. This aspect of the draft Constitutional Treaty reflects the belief of national governments that the best way to improve the Union's ability to prosecute cross-border crime is to make national criminal justice systems 'interoperable'. Simply put, this requires two things: member states must ensure that their courts recognise each others' decisions – the principle of 'mutual recognition'. And, *to some extent*, member states must smooth out differences between the way their laws define and punish crime, and the way they run their prosecutions and trials – a process called approximation.

The governmental debate is about how far 'some extent' should go. Germany, Belgium and France support harmonisation. They argue that member states should reform their national criminal codes to adopt the same definitions for serious cross-border crimes and the same criminal procedures for the courts trying them. The UK, Ireland and others prefer the looser approximation method: to agree at the EU level the upper and lower limits for the definition of crimes and their penalties, and to ensure that national courts recognise each other's decisions. The draft Constitutional Treaty's approach to criminal law reform thus mostly reflects the UK government's preference over Germany's preferred method.

Some lawyers, however, including some within the UK's cabinet office, question whether approximation and mutual recognition are going to work in practice. First, the member states have very different criminal laws and procedures that often conflict, so governments will have to overhaul national laws more than they are currently letting on. For example, in Italy courts may try a person in their absence. In other member states, this is illegal. So a German court will not recognise the verdict of an Italian court that is unconstitutional in Germany.

Second, in practice, the minimum procedural rules may not be good enough for the courts, because rules vary drastically around the Union – especially between the UK and Ireland and the continent. This makes it possible that a UK prosecutor's case could fail because the court will refuse to accept evidence that has been gathered in France under French procedures, or because Catalan police detained a suspect for 72 hours, which could be a denial of rights in the UK and result in the court setting the suspect free. Defence lawyers will continue to use inconsistencies to thwart prosecutions until member states iron out the inconsistencies – which sounds a lot like harmonisation. If there is a good chance the member states will have to harmonise some of their criminal laws anyway, why not give the EU the power to begin the process now and save the agony of decades of watching defendants go free on procedural grounds?

### **Creating European Union security**

*Europe has never been so prosperous, so secure nor so free.*  
'A Secure Europe in a Better World' (the draft EU security strategy)

Some people argue that the EU has no business being involved in fighting terrorists and criminals. They say sensitive security matters such as these should be left to the nation-states. There is a simple reason why the Union should play a role. Organised crime and international terrorist groups are transnational issues *par excellence*: no individual member state can address organised crime and international terrorist groups as effectively as when the member states work together.

The draft Constitutional Treaty would make it easier for the Union to make better policies for organised crime and terrorism more rapidly. The treaty streamlines the existing messy JHA law-making procedures and would allow the EU to use qualified majority voting on most JHA issues.

The draft treaty proposes other positive reforms. It would put Europol on a much firmer legal basis within the EU treaty structure, so that member states can reform and develop it more easily. The draft treaty also encourages more coordination between Europol and Eurojust, and makes frequent reference to the need for the Union to cooperate with non-member countries in order to make effective JHA policies. This is an important step, because many of the threats to the Union have their origins beyond its territory. But the draft treaty leaves it to member states to decide what institutional changes may be necessary to make this possible.

These are useful changes, but member states should go further. Member states, to get better at spotting threats, should work together more on gathering and assessing intelligence. This is important, because one of the causes of disagreements among member states about how to respond to issues like Hamas and Hizbollah – or Iran – is the fact that governments receive different information about their activities and assess it in different ways. The UK, because of its links with Israel and the US, sees more evidence on the depth of their terrorist activities.

Member states should coordinate their intelligence-gathering by deploying their human and technological intelligence resources to reduce overlap. If they did this, they could cast their net more widely, i.e. spy on more of the world for the same amount of euros. There are huge practical and political challenges to making this work. The largest is trust. None of the big member states is ready to tell its spies to vacate another region ('don't worry chaps, you can all go home, the Germans will be covering the Ukraine from now on'), and rely totally on another member state to watch its back there. In some regions, however, one member state may have a clear lead in information-gathering and others could scale down their already smaller presence. France has good networks in North Africa for example, and it may be better if other services do not try to replicate those networks.

During the Cold War, the US and the UK's intelligence agencies used to have an understanding about who 'owned' which parts of the world. The US usually let the UK take the lead in most of its former colonies for example. Where one agency had priority, the other would, to a certain extent, trust its partner to pass on any relevant information. Although the US and UK intelligence agencies have an unusually high level of trust, it is possible that, over time, the Europeans could develop the same level of trust.

Apart from coordinating their intelligence-gathering efforts, member states' police and intelligence services should also share more assessments – on certain terrorist or organised crime groups for example, and on the risk presented by troubled states, like Moldova. And member states should also do more joint assessments. A joint assessment is where analysts from different countries work together to make a common assessment of a particular threat. The national police and intelligence officers seconded to Europol currently do a limited amount of common assessments. Joint assessments are difficult where the threat is politicised. It is impossible to imagine Britain, France and Germany sharing too many assessments about Iraq in the lead up to the invasion. But there should be fewer blocks to doing joint assessments of al-Qaeda-related threats or the threat posed by an arms trafficker, like the infamous ex-KGB trafficker Victor Bout, who the UN identified as a major supplier to conflicts in Sierra Leone and Liberia.

Many different national bodies work on terrorism and organised crime. Apart from external intelligence agencies, the police, customs, the armed forces, security services and border

guards are all involved. There are also EU agencies and institutions, such as Europol, High Representative Javier Solana's Situation Centre (SITCEN), the Political and Security Committee (COPS), the defence chiefs, the justice and home affairs ministers. At present, there is not enough coordination among the national agencies, or between the national and EU-level organisations. To rectify this, the draft treaty proposes a sort of internal security committee within the Council, to "facilitate coordination of the actions of member states' competent authorities".

To achieve this sort of coordination, the Union needs more than a toothless standing committee staffed by low-ranking ministerial officials. Member states should create a European Security Council (ESC). It would have two tasks: first, to identify and analyse threats and propose responses to the European Council. Second, the European Security Council should drive reforms aimed at improving coordination among EU and national defence, law enforcement and security agencies. The ESC would absorb a lot of the security tasks currently performed by the High Representative for Foreign Policy. For example, the ESC should be responsible for drafting the annual EU security strategy.

The Council president would chair the meetings and attendance at ESC meetings could depend on the meeting agenda. The highest-ranking representatives from the main security-related bodies – external as well as internal – would be eligible to participate in ESC planning. This includes Europol, the JHA Council of Ministers, the new foreign minister, the defence chiefs, the chiefs of police task force and representatives nominated by the national security services and intelligence agencies. It would also possess a permanent staff.

The structure of the ESC would reflect the nature of the main threats to the EU. Mr Solana's draft security strategy identifies three primary threats – international terrorism, the proliferation of weapons of mass destruction and failed states, and organised crime. All of these threaten the EU both from within and externally. To address these threats, the EU has to coordinate the work of national police forces and security services, which are typical justice and home affairs agencies, with the work of its diplomats, spies and armed forces.

The member states must also strengthen existing EU agencies like Europol and Eurojust by continuing to push their national police services to feed Europol and Eurojust information, and to work with them on joint investigations and prosecutions. And in some areas, like border control and intelligence-assessment, Europe needs to create new agencies to improve EU-level capabilities and coordinate the work of national services. Again, the draft treaty does not push the EU far enough here. The enabling article for the widely demanded EU border guard agency is extremely weak. It calls for the "gradual establishment of an integrated management of external border control", which does not establish a clear end-goal for the EU to deliver.

The EU must, however, build the area of security on more than better institutional arrangements. Effective cooperation on the ground between the hundreds of national and regional law enforcement and security agencies is at least as important.

The Union should continue to remove laws and other impediments that prevent law enforcement services from exchanging information about suspects, cases and threats, and doing more joint investigations. Aside from lowering legal barriers, the Union must provide the practical infrastructure for cooperation, such as links between computer systems, trusted translation facilities and common protocols for information exchange. The draft Constitutional Treaty makes it easier to create JHA laws, thus it improves the potential for making these reforms more rapidly. But it will take national politicians to put pressure on their police and customs officers to cooperate more internationally.

Ultimately, law enforcement officers will only work together if they trust one another and if they recognise that cooperation will help them get their job done better. So if French and German police officers do not trust one another or do not believe that cross-border cooperation can help get results, then they will not do joint investigations – regardless of whether a law exists that permits it or not.

In this sense, the Union must also build the area of security from the bottom up. So it cannot rely on the methods used to construct the single market, which were largely built by promulgating laws from above. To knit together an area of security, the EU needs to intensify the exchange of law enforcement and security officers between national agencies, and to create more centres where law enforcement and security officers from different countries and forces work together on joint projects.

At the moment, member states are mostly responsible for the exchange of law enforcement officers and the planning of joint operations and exercises – although the Union does provide funding through various mechanisms. The Union could consolidate some of these efforts into an EU programme, as a sort of ERASMUS for police officers.

Bilateral and trilateral cooperation centres exist on many of the borders between EU member states. For example, successful centres are located on the French-German and Belgian-French borders. National governments set these centres up outside of the EU framework. Customs, police and immigration officers from both countries share an office and are charged with coordinating cross-border matters, such as investigations that involve both countries. More ambitiously, the Union has set up a permanent office hosted by the German government in Berlin, to assist cooperation between land border guards throughout the Union. These centres are very valuable because they combine a way to strengthen personal relations with the practical tools that make cross-border policing easier. The Union should create more of these throughout the Schengen area.

## **Conclusion**

The European Union's leaders have always been fond of promising grand things – but delivering them late. The penalty for delay in creating the single market is measured in lost opportunities to spur economic growth. The penalty for delay in building the area of freedom, security and justice could be an increase in crime, a reduction of confidence in the courts and an increase in insecurity on the part of Europeans. The member states must recognise that the area of freedom, security and justice is not optional, and use the IGC to give the Union the ability to build it.

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